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Supreme Court of the United States

OCTOBER TERM, 1968

No. 537

HENDRY CORPORATION,
Petitioner,

versus

UNITED STATES FIDELITY AND GUARANTY COMPANY,
Respondent.

RESPONDENT'S BRIEF OPPOSING REVIEW.

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RESPONDENT'S BRIEF OPPOSING REVIEW.

Respondent respectfully opposes the issuance of the Supreme Court's discretionary writ for review of the decision herein by the United States Court of Appeals, Fifth Circuit.

The Court of Appeals decision does not, as claimed in the petition, present questions under the Miller Act (40 USC 270b) which in anywise affect the state-federal judicial relationship; and if, *arguendo*, the decision does present any such question, it can never have application to more than an infinitely narrow segment of the national community.

Neither is the decision in conflict with the decisions made in *Massachusetts Bonding & Ins. Co. v. Robert E. Denike, Inc.*, 92 F.2d 657 (3d Cir. 1937),

nor in *United States for Use and Benefit of Capolino Sons, Inc. v. Electronic & Missile Facilities, Inc.*, 364 F.2d 705 (2d Cir. 1966).

THE QUESTION INVOLVED IN THE COURT OF APPEALS DECISION.

A.

The Fifth Circuit decision deals with the enforcement of a right which exists solely by virtue of an act of the Congress which specifies the exclusive method and means of enforcement, against the surety on a bond given for the sole purpose of fulfilling the demands of that act. Since 1905 the present and prior federal statutes (Heard Act, 33 Stat. 811; Miller Act, 40 USC 270) have specified in identical language that actions on such bonds shall be brought in the United States District Court "and not elsewhere." No question of state-federal judicial relationship can be presented by the refusal of a federal court to translate, without hearing or trial, a subcontractor's state court judgment against a federal public works contractor into a federal court judgment against the contractor's surety on a bond given to conform to a federal statute which vests exclusive judicial enforcement in the federal courts.

Logic fully supports the conclusion of the Court of Appeals that in these circumstances the full faith and credit argument "'offends the Congressional mandate" (R. 127).

B.

The infinitesimal of public involvement in the decision is manifest from the actuality that in all of the more than sixty years between the time when the Congress first ordained that actions on public works bonds should be maintained in the United States District Court "and not elsewhere" and the 1968 decision in the case at bar the federal appellate courts have been called upon only once to weigh the effect of a state court judgment upon the surety.

Massachusetts Bonding & Ins. Co. v. Robert E. Denike, Inc., supra.

Much less serving no public benefit, a review of the decision in this case (even a reversal) would not even serve the purpose of resolving the litigation between the parties; for there remains to be adjudicated by the District Court the issue of whether Hendry Corporation is a joint-venturer with the prime contractor without the protections of the statutory bond.

THERE IS NO CONFLICT OF DECISIONS.

A.

The decision of the Third Circuit in *Massachusetts Bonding* is that a Heard Act surety which *participates* in a state court action brought by an electrical subcontractor against the surety's principal (the

prime contractor) is, *by the surety's participation*, concluded *as to the issues decided by the state court.*

No court of appeals has previously decided whether the surety would be bound by a judgment in a state court proceeding in which the surety did not participate. That question is the issue which was made in the present case, and the Fifth Circuit has resolved the issue in favor of the surety.

Respondent recognizes that the Fifth Circuit said in its opinion (R. 131):

> "We therefore hold that a state judgment in a suit between a subcontractor and a prime contractor does not bind the surety in the subcontractor's Miller Act suit against it."

That this statement correctly construes the Miller Act finds strong support in the plain language of the statute, but the point is not for argument in this brief. The nub of the proposition here is that the respondent surety did not participate in the state court case and the decision that this surety is not concluded by the state court judgment is not in conflict with the holding in *Massachusetts Bonding* that by participation the surety concludes itself.

In its effort to make conflict petitioner seizes upon a comment in the District Court's opinion that the surety was for a time represented in the federal court by the same attorney who had been counsel of

record for the contractor in the state court proceeding since 1957. This is the fact. That this fact is not significant is apparent from the chronology as disclosed by the record:

October 24, 1957 (R. 93)—William Fisher, Jr., counsel for the prime contractor, served and filed an answer in the state court proceeding.

April 16, 1962 (R. 1)—Hendry filed Miller Act complaint in the U. S. District Court joining as defendants both the contractor-principal and its surety.

April 23, 1962 (R. 6)—William Fisher, Jr., Esquire, acting as counsel for both the principal and surety answered the Miller Act complaint.

November 19, 1962 (R. 58)—Trial of the suit against the contractor in the state court was commenced.

May 16, 1963 (R. 85)—Independent counsel appeared for the surety in the Miller Act case.

July 13, 1964 (R. 93-98)—Judgment was entered against the contractor in the state court.

It is the legal obligation of a principal to indemnify his surety against loss and expense. It is common practice for the principal, in discharging this obligation, to arrange for his counsel to answer for the surety also. For Mr. Fisher, who had been representing the contractor in the state court proceeding for five

years, to answer for the contractor and also for its surety a federal suit complaint by the subcontractor does not constitute *participation by the surety* in the state court suit.

There is no question but that the surety here had knowledge of the state court case. Neither is there any question that the surety was a defendant in direct Miller Act litigation. The Third Circuit concerned itself with participation by the surety, not knowledge of the surety.

Actually none of the issues which would arise in the trial of this Miller Act suit were determined in the state court. The judgment of the state court was that "Smith owes Hendry as per account stated between the parties" (R. 93, 96). The state court Judge dictated into the transcript of trial his holding that the basis of the contractor's liability is the contractor's estoppel to deny the debt (R. 58, 59).

Essentially ACCOUNT STATED is a subsequent independent (express or implied) promise to pay. The state court did not undertake to decide any of the Miller Act issues presented in the United States District Court.

B.

Petitioner also urges that the Fifth Circuit decision is completely at variance with the approach of the Court of Appeals for the Second Circuit in *United*

States for Use and Benefit of Capolino Sons, Inc. v. Electronic & Missile Facilities, Inc., 364 F.2d 705 (2d Cir. 1966), cert. dismissed 385 U.S. 924.

The holding in *Capolino* is that where, by the terms of the subcontract the parties have agreed to arbitrate disputes, upon the *joint petition* of the general contractor and his surety made in a Miller Act suit, the court will stay the suit pending arbitration. The joinder of the surety in seeking arbitration is the *participation* which *Massachusetts Bonding* holds concludes the surety. In the case at bar there was no participation by the surety in seeking an extrafederal determination of the subcontractor's claim.

United States for Use and Benefit of Frank A. Trucco & Co. v. Bergman Const. Corp., 256 F.2d 851 (7th Cir. 1958), is an earlier case which considered the surety's status with respect to an arbitration clause in the subcontract. There the Seventh Circuit in its opinion cited with approval *Modern Brokerage Corporation v. Massachusetts Bonding & Ins. Co.*, 54 F.Supp. 939 (S.D. N.Y. 1944), wherein the District Court said:

> * * * "The answer verified by an officer of the surety company 'claims the right to submit the questions in dispute herein to arbitration.' The surety had no such right. The questions in dispute were, it is plain, the issues in the action. At most, the surety had the right to demand that

the action be stayed until the owner's right to compel arbitration of disputes arising under the contract between the owner and contractor was given effect." *Without its consent, the surety could not be bound.* (Citations omitted. Emphasis added.)

C.

Through the cases with which it is claimed *Hendry* is in conflict runs the cogent thread that the surety's express or implied consent is essential to the conclusion of the surety by a determination made outside the federal court. Despite the unnecessarily broad language of the Fifth Circuit in its opinion, that opinion does not say, and cannot be stretched to say, that a Miller Act surety would not be concluded by the decision of some other court or body by which the surety had expressly or impliedly agreed to be bound. There is no conflict between the decisions of the courts of appeal.

CONCLUSION.

The petition for writ of certiorari should be denied.

.....

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CERTIFICATE OF SERVICE.

I DO HEREBY CERTIFY that copy hereof has been furnished to the following by mail:

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Done this .... day of ....., 1968.

.....

E. DIXIE BEGGS.